

Before the
Montgomery County Common Ownership Commission
Montgomery County, Maryland

In the matter of:

Majlinda Bejo and Al Bejo	x	
36 Owens Glen Court	x	
North Potomac, MD 20878,	x	
Complainants,	x	
	x	
v.	x	Case No. #41-11
	x	August 16, 2013
Olde Potomac Park Community	x	
Association, Inc.	x	
c/o Property Management People, Inc.	x	
955-A Russell Avenue	x	
Gaithersburg, MD 2087,	x	
Respondent.	x	

MEMORANDUM DECISION AND ORDER

The above-entitled case having come before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The Hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

On August 23, 2011, Majlinda Bejo and Al Bejo (Complainants), owners of 36 Owens Glen Court, North Potomac, Maryland, a lot within the Olde Potomac Park Community Association, Inc., filed a complaint with the Office of Consumer Protection against Olde Potomac Park Community Association, Inc. (Respondent). They alleged that in 2011, the Board of Directors of the Respondent denied the Complainants' request and subsequent appeals to install a split rail fence in the backyard of the property located at 36 Owens Glen Court.

Inasmuch as this matter has not been resolved by mediation, the dispute was presented to the Commission on Common Ownership Communities for action pursuant to § 10B-11(f) of the Montgomery County Code on February 1, 2012, and the Commission accepted jurisdiction. A hearing was held on November 28, 2012.

Prior to the hearing, the Complainants served discovery requests upon Respondent, which

Respondent answered. However, there is nothing in the record to show that Respondent served discovery on the Complainants. Complainants proceeded *pro se* throughout the case. Respondent was represented by counsel from the time it answered the complaint until the hearing, at which it was represented by a different attorney from the same firm. The Hearing Panel held the record open for 60 days in order to allow Respondent to file evidence to rebut the expert reports filed by Complainants. After the hearing the Respondent changed counsel and was represented by a different law firm, which filed several post-hearing motions.

After the hearing, there were several motions filed by Respondent and objected to by Complainant. The Panel's rulings on these were essentially that Respondent could file rebuttal reports and Complainant could not file any additional evidence. The Panel allowed the expert reports presented by Complainant at the hearing to remain on the record. Thus, the record contains expert reports from both parties on the issue of harmonious fence styles.

Complainants argued that the Respondent's denial of their requests to install an "open-design" fence, such as split rail or picket, was unreasonable. Their evidence, which was uncontroverted, was that there were other split-rail fences within the Respondent's boundaries and therefore split-rail fences were harmonious with the overall design plan of the community. They buttressed their case with written reports from landscape architects and landscapers. Respondent objected to these reports as hearsay and as not being expert testimony. Respondent testified that since 2009, it has only approved applications for the construction of a 6-foot tall, shadowbox fence in the townhouse section of the community. Complainants argued that such a fence would cut off air and sunlight from their small garden, which is already shaded by the house for part of the day.

Respondent conceded that there were split-rail fences in the neighborhood but only adjacent to detached houses, in the common areas or separating sections of the neighborhood from each other; but split-rail fences were incompatible with townhouses, such as the Complainants'. According to the Respondent, the only appropriate design of fence for the townhouse section was a privacy fence. After the hearing, with the Panel's permission, Respondent also provided a report written by an expert in landscaping design which took the position that split rail fences were not aesthetically appropriate for townhouses.

Respondent argued that its decision must be upheld under the "business judgment" rule as enunciated by the Court of Special Appeals in *Black v. Fox Hills North Community Association*, 90 Md. App. 75 (1992). Complainant argued that the board's decision was unreasonable and in violation of the Respondent's documents.

Findings of Fact

1. Mr. and Mrs. Bejo reside in the townhouse section of the Olde Potomac Park Community Association. They are members of the Association and subject to its governing documents.

2. Olde Potomac Park Community Association is a homeowners association as that term

is defined in Section 11B-101 of the Real Property Article of the Code of Maryland. It is governed by documents filed in the land records and the Homeowners Association Depository of the Circuit Court for Montgomery County, Maryland.

3. In April, 2011, the homeowners applied and obtained approval from the Association to install a vegetable garden in the backyard of their home. In an effort to prevent damage to the vegetable garden from foraging deer, the homeowners requested permission to install a split rail fence with chain link or wire netting around the garden. In May, 2011, the Architectural Review Committee denied the request. The homeowners then appeal the decision to the Board of Directors for the Association. On July 13, 2011, the Board of Directors held a hearing to review the homeowners' appeal. The Board of Directors declined the appeal. According to the letter dated May 2, 2011 from the Association, the reason for the denial was because the request would violate Article VII, Section 1(u) of the Old Potomac Park Community Association's Declaration of Covenants, Conditions and Restrictions.

4. The Declaration of Covenants, Conditions and Restrictions for Olde Potomac Park Community Association at Article VII, Section 1(u), states:

No fence may be approved by the Board of Directors unless said fence meets all of the following characteristics: it shall be made of wood, stained its natural color or painted white, be no more than forty-eight (48) inches in height, be within the property lines of the Lot on which it is proposed to be located, and be entirely to the rear of the rearmost portion of the house located on said Lot, and otherwise be fully in accordance with the zoning Regulations or other applicable regulations of Montgomery County, Maryland. Notwithstanding the above, any type of fence installed by the Declarant, its successors or assigns, shall be the exclusive type of fence installed on any Lot thereafter.

5. The Architectural Review and Controls Approved Administrative Amendment (hereinafter "Architectural Amendment"), Attachment #1, Sections 2, 4 and 6 states:

2. Fencing must be unpainted treated wood and no higher than four feet for single-family homes and 6 feet for townhomes. To surround an in-ground swimming pool or to border a back property line, a six foot fence may be requested.
4. No solid board or stockade fences will be allowed.
6. Thin wire may be attached to the inside of a wooden fence in order to contain small children or pets.

6. At the time of the hearing, the Complainants had not installed a fence and were not in violation of any governing document, but desired to install a fence that would not block sunlight

onto their vegetable garden. While the request was for a split rail fence they also demonstrated through testimony that they were flexible on the type of fencing and would, if necessary, install picket fencing. Mr. Bejo provided pictures of several fences within the community of various styles including split rail fences.

7. The community manager for the Association, Eric Cooper, testified that the Board of Directors reviews all architectural applications because the Association does not have an architectural committee. Mr. Cooper acknowledged that there are split rail fences within the community, but testified further that split rail fences are only allowed within the single family home section of the community and that the Association has not approved split rail fences for the townhome section of the community since he has served as the manager for the Association. Only shadowbox fences were permitted in the townhome section. He further testified that his company was hired by the Association in 2009. There are no records of any architectural applications prior to this period, nor did the manager have any firsthand knowledge of what was approved prior to this period. The manager testified that the Board denied the application for a split rail fence because it was not harmonious in design and violated the Declaration. Mr. Cooper also testified that the developer only constructed privacy fences in the townhome section.

8. The Declaration of Covenants, Conditions and Restrictions for Olde Potomac Park Community Association (the "Declaration") at Article V, Section 1(b) states:

Without limiting the generality of subsection (a) of this Section, none of the following actions may be taken upon any Lot unless the Board of Directors has approved such action in the manner hereinabove set forth: (19) the construction or installation of any fencing on the property.

9. There were conflicting expert reports presented by both parties as to what type of fence was in harmony with the overall design of the community. However, the panel does not find it necessary to make a finding on this point.

10. The panel understands the term "privacy fence" as used by Respondent's manager to mean a fence more or less solid in appearance that is approximately 6 feet high. A fence that is only 3 or 4 feet high can be easily overlooked and therefore does not provide privacy.

11. Article I, Section 5, of the Declaration of Covenants defines a "Lot" as:

. . . . all numbered subdivided parcels, shown on the Plat as an area for a single family residential dwelling or similar building (*whether attached or detached*) and shall not include public streets or Common Areas. (Emphasis added.)

Conclusions of Law

1. As stated earlier, Article VII, Section 1(u) of the Declaration for Olde Potomac Park Community Association limits fences within the community to four (4) feet in height. This Article creates an exception for fences installed by the developer or declarant. These were filed in 1984. However, the (undated) Architectural Amendment discussed earlier allows fences up to six (6) feet in height for townhouses, bans solid board and stockade fences and states that thin wire may be attached to control children and pets. The Amendment's height allowance of 6 feet conflicts with the explicit language of the Declaration, and can only be applied if the Respondent can demonstrate that the declarant constructed, or allowed to be constructed, fences taller than the 4 feet permitted.

2. Respondent argues that the last sentence of Article VII, Section 1(u), limits fences in the townhome section to privacy fences because the developer only constructed privacy fences in that section. Assuming that it is true that the developer only constructed privacy fences in the townhome section, that does not compel the conclusion that other fence designs are prohibited in the townhome sections. The sentence actually states that, "[n]otwithstanding the above, *any type of fence installed by the Declarant*, its successors or assigns, shall be the exclusive type of fence installed *on any Lot* thereafter." (Emphasis added.) This Article does not distinguish between townhome lots and other lots, and Article I defines the words "Lots" as including both detached and attached dwellings. Moreover it is uncontroverted that the Declarant installed split rail fences elsewhere in the community, including near the townhomes. Consequently, we can only conclude that the Declarant intended to permit *both* split rail fences *and* privacy fences. The Article does not permit the interpretation that split rail fences are banned on some "Lots" but permitted on others. We therefore hold that under the Declaration of Covenants, both split rail and privacy fences are permitted for all lots.

3. It also appears that the Architectural Amendment contemplated something other than shadowbox fencing as the sole type of fencing within the community. First of all, it banned "solid wood" fences. Although a shadowbox fence is not solid wood because there are gaps between the vertical boards (the boards alternate on opposite sides of the horizontal rails), from most angles it still presents the appearance of a solid wood fence. Secondly, the Amendment allows for thin wire fencing or mesh to close up the gaps so as to restrain children and pets. Thin wire is not necessary for shadowbox fencing since the gaps in such a fence are only an inch and a half (this is the thickness of the standard "2 by 4" rail) and therefore are too small for children or pets. However, thin wire would be necessary for split rail fencing or other open type of designs including picket fences. Additionally, the Architectural Amendment does not require any specific type of fencing and only bans three types of fences (solid wood, stockade, and free-standing metal). If the author of the document intended to ban split rail fences at the same time he explicitly referred to solid board and stockade fences, then one would assume that the author would have indicated such a ban as he did with the other designs. We therefore hold that the Architectural Amendment does not prohibit split-rail fences or picket fences.

4. However reasonable the Board's decision concerning the aesthetics of privacy fences versus split rail fences in a townhouse community might be, the Board of Directors' decision to restrict townhouse fences to privacy fences violated the Declaration and the Architectural Amendments. Both the Declaration and the Amendments permit split rail fences on all lots, including the townhouse lots.

5. The Board violated its Architectural Amendment by allowing only shadowbox fencing, which is much less consistent with the plain language of that Amendment than are the split rail or picket-type designs proposed by the Bejos. The Architectural Amendment clearly envisions and permits other designs that are open enough to require wire mesh to keep children and pets from escaping. While the Board has the authority to decide what types of open fence designs to allow under the Amendment, the Board cannot prohibit all open-design fences and cannot restrict Townhouse Section fence designs to shadowbox fences.

6. The Respondent argued that its decisions must be upheld unless arbitrary or motivated by bad faith, citing *Black, supra*; see also, *Reiner v. Ehrlich*, __Md. App. __ (May 29, 2013). We must note that in *Black*, the decision under review allowed a member to construct a fence, whereas here the association seeks to restrict a member's right to construct a fence; and in *Reiner* the rule being applied to restrict a member's right to select the roofing material for his house was crystal clear as well as clearly related to the roofing materials actually installed by the developer. Moreover, the business judgment rule only protects the "legitimate business decisions" of the association, and that means the association must have the legal authority to have made the decision. Associations cannot exceed the authority granted to them by the law or by their own governing documents, *Ridgely Condominium Association v. Smyrnioudis*, 681 A.2d 494 (Md. 1996) (condominium lacks authority to deprive commercial unit owners of the same access to the common areas that residential unit owners have); *Syed v. Llewellyn Fields HOA* (CCOC #24-12, January, 2013) (HOA board cannot ban all rentals of a part of a home where the covenants allow such rentals with the approval of the board); *Voorhees v. Decoverly I HOA* (CCOC #05-11, November, 2011) (board cannot spend common funds to maintain private property when covenants only permit use of common funds to maintain common property). We conclude and hold that the Respondent's rejection of the application to construct a split rail fence and to limit Complainants to a 6-foot privacy fence was beyond the Respondent's authority under its Declaration and Architectural Amendments. Respondent would be well served if it amended its existing governing documents regarding fencing in order to avoid future confusion by homeowners over what fence styles are allowed within the association and where they are allowed.

ORDER

1. The Respondent's decision to deny the Complainants' fence application is invalid and the Complainants may proceed immediately to construct a split-rail fence, with wire mesh

attached if they wish provided that the wire mesh be as inconspicuous as possible; and they may retain this fence so long as it is in good condition and they own and reside in the house. When they move, or the fence needs to be replaced, they must remove it, and if they wish to construct a new fence they must apply for permission according to the governing documents in effect at that time.

2. The Respondent's request for attorney fees is denied. Each party shall bear its own costs, except that Respondent shall reimburse Complainants their filing fee of \$50.00 within 30 days from the date of this Decision.

Panel members David Weinstein and Gwen Henderson have concurred in the foregoing decision and order.

Any party aggrieved by this action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Nicole Williams
Nicole Williams, Panel Chairwoman
Commission on Common Ownership Communities